In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 466

ST. HELENA PARISH SCHOOL BOARD, ET AL.,
PETITIONERS

v.

LAWRENCE HALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C 97–139) is not yet reported. The opinion of the United States District Court for the Western District of Louisiana (Pet. App. B 69–81) is reported at 293 F. Supp. 84; *Moore* v. *Tangipahoa Parish School Board* is reported at 298 F. Supp. 283 (E.D. La.); the remaining decision from the Eastern District of Louisiana (Pet. App. B 82–96) is reported.

JURISDICTION

The judgment of the court of appeals was entered, pursuant to the terms of the opinion (Pet. App. C

364-374—69

124), on May 28, 1969. The petition for certiorari was filed August 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding unlawful the freedom of choice method of student assignment and faculty desegregation plans based on voluntary transfers in these school districts, and requiring the submission of new desegregation plans.

STATEMENT

1. The 18 cases to which the United States is a party are school desegregation suits brought here from a decision of the United States Fifth Circuit Court of Appeals reversing [1] district court orders approving the continued use of desegregation plans based upon freedom of choice.[2]

None of the school districts involved took any steps toward desegregation pursuant to the decisions in *Brown* v. *Board of Education,* 347 U.S. 483, 349 U.S. 294, until ordered to do so by federal district courts. In 1967 each of these school districts was required to

[1] In one case, *Moore* v. *Tangipahoa Parish School Board*, No. 27,391, the district court had ruled out free choice and the court of appeals affirmed that decision. See Pet. App. C 122–123; 298 F. Supp. 283 (E.D. La.). (The district court opinion is not reproduced in the petition for certiorari.)

[2] The Fifth Circuit had appeals in 38 cases pending before it. Six cases decided in the district court on the basis of the Fifth Circuit's decision in these cases, those involving the West Carroll, Morehouse, Catahoula, Sabine, Calcasieu and Webster Parish School Boards, were not appealed to the Fifth Circuit, although included in the petition for certiorari, are not now properly before this Court.

implement a free choice plan for the 1967–1968 school year based on the model decree set forth in *United States* v. *Jefferson County Board of Education,* 380 F. 2d 385 (C.A. 5) (*en banc*), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840.

Motions for supplemental relief in conformity with the decisions of this Court in *Green* v. *County School Board,* 391 U.S. 430, and its companion cases, were filed in June and July, 1968. The district courts continued hearings commenced in July on these motions until November 1968; and the United States and private plaintiffs took appeals to the Fifth Circuit Court of Appeals, seeking summary reversal of the district courts' failure to order the implementation of new plans for the 1968–1969 school year. The court of appeals declined to reverse but, rather, ordered the district courts to hold expedited hearings on the pending *Green* motions with a view to determining whether freedom of choice was adequate to convert these dual school systems based on race to unitary, non-racial systems. *Adams* v. *Mathews,* 403 F. 2d 181 (C.A. 5). In all but the *Tangipahoa Parish* case, the district courts for the Eastern and Western Districts of Louisiana found for defendant school boards and denied the relief sought by the government and private plaintiffs. The parties plaintiff appealed to the court of appeals which reversed, and the school boards seek review of that decision by this Court.

2. The 18 school districts involved operated racially dual school systems until they were brought into litigation. Prior to the judicial imposition of free choice

plans, students in these districts were assigned to schools substantially on the basis of white and Negro geographic attendance units. After two years of operation under *Jefferson*-type free choice plans, in the 13 school districts in the Western District of Louisiana, during the 1968–1969 school year, approximately 97 per cent of the Negro students attended 104 virtually all-Negro schools. In all but one of these school systems, less than five per cent of the Negro students attended the traditionally white schools—the exception being Avoyelles Parish, where 12 per cent of the Negro students attended desegregated schools. The proportion of teachers assigned in 1968–1969 to faculties in which their race was a minority did not exceed ten per cent in any of these 13 school districts, and in most of the districts it was far less. No white students attended traditionally Negro schools, except for one white student in each of two parishes—Bossier and Caddo.

In the five cases from the Eastern District of Louisiana to which the United States is a party, approximately 94 per cent of the Negro students attended 30 all-Negro schools during the past school year. In four of the school districts 4.5 per cent or less of the Negro students attended traditionally white schools in 1968–1969, and in the fifth district—Iberville—that percentage was less than ten per cent. The proportion of teachers assigned in 1968–1969 to faculties in which their race was a minority ranged from five to eight per cent. No white students have ever

attended traditionally Negro schools in any of these parishes.[3]

In each of these cases the evidence presented to the trial court revealed that there were readily available alternatives to free choice which could be implemented without administrative difficulty and which would result in the prompt and total conversion of the dual school system into a unitary one.

ARGUMENT

1. A school board operating schools once segregated by law is under a constitutional obligation to bring about "[t]he transition to a unitary, nonracial system of public education." *Green* v. *County School Board, supra,* 391 U.S. at 436. They "have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools." *United States* v. *Jefferson County Board of Education, supra,* 380 F. 2d at 389. In approving free choice as a means of reaching this result, the Fifth Circuit Court of Appeals cautioned school boards against confusing the means and the end.

[3] Projections as to what the current school year's statistics were likely to be were before the court of appeals in the form of the *Jefferson* decree reports required to be filed each spring. See 380 F. 2d at 395. The data are compiled in the charts which appear as an appendix to the opinion of the court (Pet. App. C 126–139). The court of appeals stated that analysis of those data led it to conclude that under free choice the situation would not vary "sufficiently that compliance with constitutional standards can be projected" (Pet. App. C 115). See also *id.*, at 121–122.

"Freedom of choice is not a goal in itself. * * * [It] is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system." *Id.* at 390.

In *Jefferson* the court warned that the test of any plan was in its results, and that rule became the holding of this Court in *Green* and its companion cases. If the dual system remains and "there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." 391 U.S. at 441. Accordingly, when these cases were first before the court of appeals in *Adams* v. *Mathews, supra,* they were remanded with directions that the district courts resolve

> (1) whether the school board's existing plan of desegregation is adequate "to convert [the dual system] to a unitary system in which racial discrimination would be eliminated root and branch" and (2) whether the proposed changes will result in a desegregation plan that "promises realistically to work now". * * *

403 F. 2d at 188. Minimum standards for assessing the effectiveness of desegregation plans were set forth for the district's courts' guidance (*ibid.*):

> If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green.* * * *

The all-Negro school was still a part of each of these 18 school systems and, under the projections for the 1969–1970 school year, would have remained a part of the system, without any prospect of losing its racial identity in the foreseeable future under free choice. In *Green* v. *County School Board, supra,* 391 U.S. at 441, as many as 15 per cent of the Negro students were enrolled in schools traditionally maintained for whites. In each of these 18 cases that percentage had not been achieved by the 1968–1969 school year and it was not anticipated that any district would even achieve that plateau under free choice in the current school year. The faculty desegregation statistics, which resulted from a program of assigning teachers to a school in which their race was in a minority only with their consent, demonstrated that faculties continued to be tailored for heavy concentrations of either black or white students.

The defendants' desegregation plans failed, therefore, in several respects, to meet the standards announced in *Green* v. *County School Board, supra; Raney* v. *Board of Education,* 391 U.S. 443; *Monroe* v. *Board of Commissioners,* 391 U.S. 450; *Bradley* v. *School Board,* 382 U.S. 103, and *Rogers* v. *Paul,* 382 U.S. 198. See also *United States* v. *Montgomery County Board of Education,* 395 U.S. 225.[4]

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[4] And see *United States* v. *Greenwood Municipal Separate School District,* 406 F. 2d 1086 (C.A. 5), certiorari denied, 395 U.S. 907; *United States* v. *Indianola Municipal Separate School District,* 410 F. 2d 626 (C.A. 5); *Anthony* v. *Marshall County Board of Education,* 409 F. 2d 1287 (C.A. 5).

2. Petitioners advance two basic arguments for granting the writ. First, they contend the decision below is in conflict with Section 407(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6(a)[5] (Pet. 6–9, 52–56), and second, they contend that in view of community opposition (Pet. 20, 32) and the likelihood that whites will refuse at this time to send their children to fully integrated schools (Pet. 37–40), and in view of the educational handicaps which black students bear (Pet. 35–36, 62), the Fifth Circuit moved too quickly and erroneously ordered the abandonment of the free choice plans at this time (Pet. 21–24, 29, 32, 43). We suggest that neither argument is in any way persuasive.

The provision in Section 407(a) of the 1964 Civil Rights Act has no applicability in a situation where the bussing of students is an appropriate and necessary device for eliminating the dual school system—the legacy of active school board discrimination. Thus, the Seventh Circuit Court of Appeals has held that Section 407(a) has no application where the transportation of students is necessary, not "to achieve racial balance, although that may be a result,

[5] The statutory provision reads, in pertinent part, as follows: "* * * [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. * * *"

but to counteract the legacy left by the [School] Board's history of discrimination." *United States* v. *School District 151 of Cook County, Illinois,* 400 F. 2d 1125, 1130, affirming 286 F. Supp. 786, 799 (N.D. Ill.) Accord, *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, 880 (C.A. 5); *Keyes* v. *School District Number One, Denver, Colorado,* C.A. No. C–1499, decided August 14, 1969, order stayed August 27, 1969, No. 432–69 (C.A. 10), stay vacated, August 29, 1969 (Mr. Justice Brennan). As District Judge Doyle observed in the *Denver* case, *supra,* "It would be inconsistent to construe the proviso as a limitation on the power of the courts to correct a deprivation of rights which Section 407(a) itself is intended to remedy."

This Court has consistently rejected arguments seeking a delay of judicial vindication of the constitutional rights here at stake based on community hostility and the potentiality of "white flight." *Brown* v. *Board of Education,* 349 U.S. 294, 300; *Cooper* v. *Aaron,* 358 U.S. 1; *Monroe* v. *Board of Commissioners, supra,* 391 U.S. at 459; *Keyes* v. *School District Number One, Denver, Colo., supra,* slip opinion p. 3. And, surely, petitioners may not profit from their failure to comply even with *Plessy* v. *Ferguson,* 163 U.S. 537. Cf. *Gaston County* v. *United States,* 395 U.S. 285.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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